SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

No. [redacted] -178

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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TABLE OF CONTENTS

	Page
Citations as to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	18
Appendix – Judgment of the Supreme Court of Appeals of Virginia	A-1
Appendix B - Order	B-1

TABLE OF CITATIONS

Cases:

Bashin v. Montedonico, 26 F.Supp. 894, affirmed 115 F.2d 837	14
Beck v. Semones' Adm'r, 145 Va. 429	15, 16
D'Arcy v. Ketchum, 11 How. 165, 13 L.Ed.648	12
Drury v. Brightwood Sanitarium Co., 133 A. 314, 150 Md. 585	11
Employers' Liability Assurance Corp. v. Perkins, 181 A. 436, 169 Md. 269	12
Garner v. Garner, 56 Md. 127	13
Godfrey v. Terry, 97 U.S. 171, 24 L.Ed. 944	12
Hanzer v. Flavio, 125 N.E. 612, 234 Mass. 320	11
Harvey v. Slocum, 29 A.2d 276, 181 Md. 205	11
Hatfield v. King, 184 U.S. 162, 22 S.Ct. 477, 46 L.Ed. 481	14
Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116	14
Keen v. Keen, 68 A.2d 200, 191 Md. 31	13
Levy v. Fitzpatrick, 15 Pet. 167, 10 L.Ed. 699	12
Lickard v. Whitenack, 151 Va. 143	18
Little v. Miller, 153 A.2d 271, 220 Md. 309	11
McGeorge v. Bigstone Gap Imp. Co., 88 Fed. Rep. 599	15

McQuellen v. National Cash Register Co. (Md. 1940) 112 F.2d 877, cert denied 61 S.Ct. 140, 311 U.S. 695, rehearing denied 61 S.Ct. 316, 311 U.S. 729 12

Moore v. Smith, 177 Va. 621 18

National Exchange Bank v. Wiley, 195 U.S. 257, 25 S.Ct. 70, 49 L.Ed. 184 13

Nixon v. Rowland, 192 Va. 37 15

Owens v. McCloskey (Owens v. Henry), 161 U.S. 64, 16 S.Ct. 693, 40 L.Ed. 837 10

Piedmont-Mt. Airy Guano Company of Baltimore v. Merritt, 140 A.62, 154 Md. 226 13

Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167 14

Sands v. Roccer, 118 Va. 191 8

Shelton v. Tiffin, 6 How. 183 ..... 14, 15

Smallwood v. Warden Maryland Penitentiary, 205 F.Supp. 325, U.S.D.C. Md. 13

Snead v. Atkinson, 121 Va. 182 16

Street v. Dexter, 77 P.2d 707, 182 Okla. 360 ..... 12, 13

Taylor v. Oulie, 212 N.W. 931 ..... 12, 13

Water Hammer Arrester Corp. v. Tower, 86 F.Supp. 732, affirmed 156 F.2d 775, cert. denied 67 S.Ct. 501, 329 U.S. 806, rehearing denied 67 S.Ct. 674, cert. denied 68 S.Ct. 452 ..... 13, 14

Webster v. Reid, 11 How. 437, 13 L.Ed. 761 11

Wilcox v. Plummer, 4 Pet. 172, 7 L.Ed. 821 13

Wiley v. Moses, 42 N.Y.S.2d 4, 266 App. Div. 801 ..... 12, 13

Wilmer v. Epstein, 81 A. 379, 116 Md. 140 13

Miscellaneous:

30A Am.Jur. 365 8

Title 28, U.S.C. Section 1254(1) 2

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The petitioner, Malcolm B. Devers prays that a writ of certiorari issue to review the judgment entered by the Supreme Court of Appeals of Virginia on the 19th day of January, 1970.

CITATIONS AS TO OPINIONS BELOW

No opinions were rendered by the Supreme Court of Appeals of Virginia in finally disposing of this cause. This cause was affirmed by a formal order entered on the 19th day of January, 1970, denying writ of error in this cause thus affirming the judgment of the Trial Court. This order is attached hereto as a part of the petitioner's appendix.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia denying the writ of error was entered on January 19, 1970. The action of the Supreme Court of Appeals of Virginia thus constituted a final judgment and affirmance of this judgment entered in the Circuit Court of Arlington County, Virginia, on the 6th day of August, 1969, became final. On April 15, 1970, by order of Chief Justice Burger, the time within which to file a petition for a writ of certiorari was extended to May 20, 1970. The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Trial Court below err in arbitrarily refusing to require the respondent to make an election of the cause of action under which it would proceed in its case thus depriving petitioner of due process in granting a judgment in favor of respondent.

2. Did the action of the Trial Court below deny petitioner due process when it is apparent on the record that he was never served personally with process in the case of a void foreign judgment (Maryland) obtained by respondent against petitroner and subsequently sued upon in the Court below (Virginia), resulting in a verdict in favor of respondent which verdict was plainly wrong and without evidence to support it.

3. Did the Trial Court below deny petitioner due process in failing to find that the foreign judgment sued on was void because the Court (Maryland) entering the judgment did not have jurisdiction over the petitioner since service of process was never obtained upon him and counsel who entered an appearance for petitioner did so inadvertently and through mistake and was never sanctioned nor authorized to appear for petitioner in that cause.

4. Did the Trial Court below err and deny petitioner due process in failing to rule on all of the merits and issues raised in this case in controversy between respondent and petitioner since respondent's pleadings initiated in the Court below presented petitioner an opportunity for the first time to actually contest respondent's claim against petitioner.

STATEMENT OF THE CASE

On November 18, 1967, the respondent, a non-resident banking institution, filed an attachment before judgment in the Circuit Court of Arlington County, Virginia, alleging a cause of action against petitioner based on a judgment rendered in the Circuit Court of Prince George's County, Maryland. Said respondent asked for a judgment against the petitioner in the amount of $23,394.55, plus interest, attorney's fees and costs.

An answer was duly filed by the petitioner alleging that the foreign judgment obtained in Maryland was void on the grounds of lack of jurisdiction. Whereupon, the respondent, pursuant to an Order of the Court, was granted leave to amend. The respondent's amended petition alleged two causes of action. Count I contained the original cause of action and Count II alleged a cause of action based on an alleged guarantee by the petitioner of an obligation of a co-defendant, U.S. Metal Plastics, Inc., a corporation of which the petitioner was president.

On the petitioner's Motion the action was removed to the U.S. District Court for the Eastern District of Virginia on the grounds of diversity of citizenship. Subsequently, the case was remanded to the Circuit Court of Arlington County, Virginia, on the grounds of lack of venue. After the petitioner filed his Answer to the amended petition, a pre-trial hearing was had and a Pre-Trial Memorandum was endorsed by all counsel and the Judge on March 13, 1969.

On or about June 18, 1964, the respondent filed a suit in the Circuit Court for Prince George's County, Maryland, against U.S. Metal Plastics, Inc., a corporation, and the Petitioner here, (Plaintiff's Exhibit A). The suit alleged a cause of action against U.S. Metal Plastics, Inc., a corporation, on a certain promissory note dated March 9, 1964, in the sum of $25,000.00 with interest at 6% per annum and a cause of action for the same amount against the petitioner, who was the president and a stockholder of said corporation at the time, as the guarantor of said obligation.

The Sheriff's return, dated June 23, 1964, shows that service was had on U.S. Metal Plastics, Inc., by serving its vice-president. On the same day the return read, "Non Est" as to the petitioner, Malcolm B. Devers. One Werner Westermann, the vice-president of said defendant corporation, delivered the suit papers to Wallace R. Schubert, Esq., an attorney, practicing in the District of Columbia, who had acted as counsel for the corporation and for the petitioner on past matters. Mr. Schubert, subsequently, forwarded the case to an associate, J. Ambrose Kiley, Esq., an attorney with offices in Prince George's County, Maryland. The testimony of both attorneys and the petitioner was to the effect that Mr. Kiley was to represent the corporation in the suit, but was not to represent the petitioner, Malcolm B. Devers, who had not been served and was not before the Court.

On or about August 3, 1964, Mr. Kiley filed an Opposition to the Respondent's Motion for Summary Judgment, together with an Affidavit in Support of said Opposition,

(Plaintiff's Exhibit #2 and #3). The language in Mr. Kiley's pleading made reference to the plural "defendants", giving the impression that the pleading was filed on behalf of the petitioner, Malcolm B. Devers, as well as the corporate defendant. Mr. Kiley testified that it was never his intention to enter an appearance for the petitioner, Malcolm B. Devers, and that the language used in said pleading was due to a mistake and inadvertance on his part. The petitioner testified that he had executed the supporting affidavit only as an officer of the corporation.

On August 28, 1964, the respondent's Motion for Summary Judgment was granted and a Judgment entered against U.S. Metal Plastics, Inc., and the petitioner in the amount of $25,708.33 with interest from date and collection fees in the amount of $3,856.25 and costs in the amount of $29.00. The judgment was granted Ex parte; Mr. Kiley not appearing at the time. It was the testimony of Mr. Kiley that he had not received notice that the plaintiff's Motion for Summary Judgment was set for a hearing on August 28, 1964. The respondent introduced a Notice from the Court's Assignment Office, (Plaintiff's Exhibit #6), which its counsel, David Cahoun, Esq., testified he had received. At no time did the defendant's counsel, Mr. Kiley, make an appearance to contest the respondent's claim against the petitioner. He did make one appearance subsequent to the taking of judgment, in the office of the respondent's counsel, Mr. Cahoun, upon depositions of Mr. Claude Vess, the accountant for U.S. Metal Plastics, Inc., and the petitioner; the purpose of the depositions being in aid of execution.

There was testimony from the petitioner that the respondent received approximately $3,500.00 from the sale of property owned by the petitioner in Luray, Page County, Virginia. It was unclear as to the nature of the proceedings initiated by the respondent to accomplish the resulting sale. The date of the sale and disbursement to the respondent was fixed as the early part of 1965. The petitioner's

testimony was that he had not been notified of any judicial proceeding involving his property in Luray and only became aware of it when notified by his agent. The petitioner was residing in Florida at the time and because of ill health and the small amount involved, decided not to retain counsel for the purpose of contesting the respondent's action.

Until the time that this proceeding was initiated on November 18, 1967, the respondent had taken no other action to satisfy its judgment against the petitioner. The petitioner, being of the belief, and being so advised by his counsel, that the Court lacked jurisdiction over him and that the judgment was void, took no action to have the judgment set aside. When this action was initiated, the Court gained jurisdiction over the petitioner, who was a non-resident at the time, and the petitioner immediately entered this appearance to contest this action.

The case was heard without a jury on June 25, 1969. At the outset, the petitioner made an oral Motion that the respondent elect to proceed on one Count instead of two on the grounds that the two causes of action constituted a misjoinder and the doctrine of merger applied. The Motion was denied. After hearing the testimony on both counts the trial court found for the respondent on Count I and made no finding on Count II.

The petitioner duly excepted to the trial courts findings and judgment for the respondent. A final Order was entered on August 6, 1969 and from this judgment the petitioner appealed to the Supreme Court of Appeals of Virginia. The Supreme Court of Appeals of Virginia refused the writ of error and denied petitioner's appeal, affirming the judgment of the Circuit Court of Arlington County, Virginia.

Petitioner submits that he was denied fundamental rights and deprived of his property in violation of due process as guaranteed unto him by the Fifth Amendment of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I

Petitioner urges that the judgment of the Supreme Court of Appeals of Virginia as announced in its formal order (App. A), affirming the judgment of the trial court compounded the erroneous determinations made and the erroneous judgment entered by the Circuit Court of Arlington County, Virginia. The trial court did indeed err in refusing to require respondent to make an election of the cause of action under which it would proceed in this case. The respondent chose the forum in which to proceed against petitioner, as well as the theories under which it sought to claim and establish liability on the part of petitioner to it, as set forth in respondent's pleadings. Consequently, the trial court should have compelled respondent to make an election of the cause of action on which it would proceed, and failure to do so, was serious error against the rights of petitioner.

In the respondent's original Petition for Attachment, (Clerk's Index #1), the cause of action was based solely on a judgment entered against the petitioner in the Circuit Court of Prince George's County, Maryland. After the petitioner filed his Answer, (Clerk's Index #27), the respondent moved to amend his petition and did so by filing its Amended Petition for Attachment Complaint to Recover Debt Due from Guarantor, (Clerk's Index #36). In the amended petition the respondent states two causes of action designating them as Count One, a cause of action based on the aforesaid foreign judgment; and Count Two, a cause of action based on the petitioner's obligation as guarantor on a corporate promissory note. The petitioner made an oral motion that the respondent be required to make an election. The Trial Court denied the motion on the grounds that the two counts were not inconsistent, being pleadings in the alternative.

It is felt that the trial Court's reasoning merely begs the question and does not justify pleadings which are obviously and plainly bad. The respondent made the choice of pro-

ceeding to sue on its judgment. Its original cause of action, one in contract, had been merged in the judgment. The doctrine of merger is a well established doctrine and is plainly stated under the heading of "Judgments" in *30A AM JUR 365* and the numerous authorities cited therein:

> "One effect of a judgment is to merge therein the cause of action on which the action is brought."

In the case of *Sands v. Roccer*, 118 Va. 191, decided in 1915, the Court there said:

> "When the judgment was rendered on the contract in this case, such contract and all rights under it ceased to exist, and the judgment became the only and superior evidence of the defendant's liability. That contract having been merged in the judgment, and thereby become functus officio, it could not be revised and made the basis of another judgment thereon in this second suit."

This ruling of the trial court clearly abrogated petitioner's fundamental rights to due process under the 5th and 14th Amendments to the Constitution of the United States.

II & III

The record here is unequivocal that petitioner was never served with process in respondent's case filed in the Circuit Court of Prince George's County, Maryland against petitioner; and the record is equally unequivocal and clear that the appearance of counsel, J. Ambrose Kiley, Esq., on behalf of petitioner therein, occurred only, solely and exclusively through mistake, inadvertence and carelessness.

In the light of these circumstances, a valid judgment in the Maryland Court could hardly obtain and endure against petitioner as a matter of law.

It had been stipulated in the Pre-trial Memorandum (Clerk's Index #60), that the petitioner was never served as

a party in the Prince George's County, Maryland suit. The next question would be whether the petitioner entered an appearance, thereby waiving service of process. The evidence is abundantly clear that the petitioner did not enter an appearance and did not authorize J. Ambrose Kiley, Esq., counsel of record for the petitioner to do so. Wallace L. Schubert, Esq., counsel for the petitioner, received the suit papers filed in the Maryland Court and forwarded them to his Maryland associate, Mr. Kiley, for the purpose of representing U.S. Metal Plastics, Inc., the corporate defendant, (Tr. 44 and 45). The instructions to Mr. Kiley were that he was not to enter an appearance for the petitioner, (Tr. 47 and 48). Mr. Kiley also testified that he was not authorized to enter an appearance for the petitioner, (Tr. 66, 67, 68, 75, 76 and 77). In addition to the testimony of both counsel involved, the petitioner clearly testified that neither attorney had the authority or were retained for the purpose of representing him, (Tr. 97, 98, 99 and 102).

Although the record of the Maryland proceeding shows an appearance by Mr. Kiley when he filed an Opposition and supporting Affidavit on behalf of the petitioner, as well as the corporate defendant, (Pl. #2 and #3), he satisfactorily explains this action as one of mistake and misadventure, (Tr. 69, 70 and 71). If Mr. Kiley were guilty of anything, it would be simply carelessness and neglect. It was never his intention to represent the petitioner as is evidenced by subsequent events. The evidence clearly shows that Mr. Kiley made no effort to represent either the petitioner or the corporate defendant. The record of the proceedings and the testimony shows that a judgment was taken by the respondent, Ex Parte, (Plaintiff's Exhibit #1 and Tr. 28). Throughout the whole proceeding, Mr. Kiley's sole effort was limited to one appearance in connection with depositions taken in aid of execution, (Tr. 74).

If, in fact, Mr. Kiley had any intention of appearing on behalf of the corporate defendant or this petitioner, or both, that opportunity, because of a proceedural error,

failed to materialize. Mr. Kiley testified that he did not receive notice from the Court (Plaintiff's Exhibit #6), that the plaintiff would ask for judgment on August 28, 1964. (Tr. 73).

As for the petitioner's part in the entire proceeding, we know that he was not served and that he took some action in the form of executing an Affidavit, (Plaintiff's Exhibit #3), in the capacity of an officer of the corporate defendant for the sole purpose of showing an understanding with the respondent that the terms of the note being sued on had been modified in certain respects and that the corporate defendant might have a defense to the respondent's claim.

It was conceded by the petitioner that the respondent took some action against his property in Luray, Virginia, and that the respondent received approximately $3,500.00 from the proceeds of the sale (Tr. 102). The respondent testified further, that he was not notified of the nature of the proceeding whereby his property was sold and that because of his poor health and the expense of litigation he took no action to enjoin the sale, (Tr. 103 and 104).

Despite the overwhelming evidence introduced to support the petitioner's position that the Court never had jurisdiction to enter a judgment against him, the trial Court found that the petitioner was barred from raising this defense. The record of this case makes it manifest and clear that it is insufficient in law and equity to allow this judgment to obtain and stand against petitioner.

The case of *Owens v. McCloskey (Owens v. Henry)*, 161 U.S. 64; 16 S. Ct. 693, 40 L. Ed. 837, it was held that a judgment rendered in an action of debt against a non-resident, who has not been served with process or failed to voluntarily appear as a defendant in such case, has no binding force. In the case at bar the record is unequivocally clear that petitioner did not voluntarily appear as a defendant in this cause, nor did he authorize, instruct or direct any one, or any attorney, to appear for him as a defendant in this cause.

Petitioner submits that the determination of the lower Court below, to the contrary, based upon the record of this cause, even giving most favorable consideration to the inferences indulged in by the Court below, can hardly be detached from arbitrary action, contrary to law. In the case of *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761, it was held that no person is required to answer a suit on whom process has not been served, or whose property has not been attached, and that a personal judgment against such a person is a nullity.

It has been held that a valid proceeding can not be had against a person until he has been notified thereof by proper summons, unless he voluntarily waives such constitutional right. See *Harvey v. Slocum*, 29 A.2d 276, 181 Md. 205 and *Little v. Miller*, 153 A.2d 271, 220 Md. 309. In the case at bar, it is unequivocally clear that petitioner was never served with process, and it is equally apparent and clear that he never did, in any active or overt manner or knowingly waive this basic right, to his detriment, nor did he ever voluntarily waive service of process upon himself. In the case of *Drury v. Brightwood Sanitarium Co.*, 133 A. 314, 150 Md. 585, it was held that an attorney without authority to employ another attorney to represent trustees, could not bind them by any representation to such attorney in absence of showing that they held him out as their representative. In the case at bar, petitioner neither hired an attorney to represent him in this cause, nor did he direct an attorney to retain another attorney to act for him in any capacity in the premises, nor did he seek or request his appearance to be made in this case, in any manner or under any circumstances.

Also see the case of *Hanzer v. Flavio*, 125 N.E. 612, 234 Mass. 320, where it was held that an attorney employed by some of several defendants has no authority to appear for other defendants. The fact that Mr. Kiley appeared for other defendants in this case, namely, Westerman, et al., did not, in any way authorize this attorney to act for appellant herein.

The record of this case clearly shows that Mr. Kiley made an unauthorized appearance for petitioner. Such an unauthorized appearance makes a judgment based thereon voidable and according to some decisions the judgment is void. See *Wiley v. Moses*, 42 N.Y.S.2d 4, 266 App. Div. 801; *Taylor v. Oulie*, 212 N.W. 931; *Street v. Dexter*, 77 P.2d 707, 182 Okla. 360. A personal judgment in Maryland can not be had against a non-resident without personal service of process within the jurisdiction or such a general appearance in the case as amounts thereto. See *McQuellen v. National Cash Register Co.* (Md. 1940) 112 F.2d 877, cert. denied 61 S. Ct. 140, 311 U.S. 695, rehearing denied 61 S. Ct. 316, 311 U.S. 729. In the case of *Employers' Liability Assurance Corp. v. Perkins*, 181 A. 436, 169 Md. 269, it was held that in an action to establish personal liability, the court can not acquire jurisdiction over person of one not resident within its territorial jurisdiction, except by actual service of notice upon him or upon some one authorized to accept service in his behalf, or by his waiver of lack of service.

In the case of *Levy v. Fitzpatrick*, 15 Pet. 167, 10 L. Ed. 699, it was held that no judgment can be rendered by a court of the United States against a defendant who is not an inhabitant of the district where the court is sitting, unless process has been served upon his person within that district, or unless he waives the necessity of such process by entering his appearance in the suit. In the case of *Godfrey v. Terry*, 97 U.S. 171, 24 L. Ed. 944, it was held that a judgment can not be rendered against a party not brought within the jurisdiction of the court, merely on the ground of a similar liability in other parties. A decree where defendant was never brought before the court is *coram non judice* void. See *D'Arcy v. Ketchum*, 11 How 165, 13 L. Ed. 648. In the case at bar, the general appearance by Mr. Kiley for an other defendant which mistakenly included ~~appellant~~ petitioner also, was actually and unequivocally an unauthorized appearance as borne out by the record here.

Thus the judgment entered by the lower court against petitioner is voidable or even void. See *Wiley v. Moses, supra; Taylor v. Oulie, supra;* and *Street v. Dexter, supra.* Surely, petitioner submits, awareness induced through an unauthorized appearance, a mistake, inadvertence and/or carelessness is neither sufficient nor adequate here, to permit a valid and subsisting judgment to obtain against him.

In the case of *Water Hammer Arrester Corp. v. Tower,* 66 F. Supp. 732, affirmed 156 F.2d 775, cert. denied 67 S. Ct. 501, 329 U.S. 806, rehearing denied 67 S. Ct. 674, cert. denied 68 S. Ct. 452, the court held that the relationship between an attorney and his client is too sacred to admit even the shadow of abuse, and every doubt will be resolved in favor of the client.

A Maryland Court has no jurisdiction to render judgment against one not served within the state, nor voluntarily appearing before the Court. See *Piedmont-Mt. Airy Guano Company of Baltimore v. Merritt,* 140 A. 62, 154 Md. 226; *Keen v. Keen,* 68 A.2d 200, 191 Md. 31; *Garner v. Garner,* 56 Md. 127; *Wilmer v. Epstein,* 81 A. 379, 116 Md. 140.

In the case of *National Exchange Bank v. Wiley,* 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184, it was held that a personal judgment against one not before the Court by actual service of process, or who did not appear in person, or by an authorized attorney, would be invalid as not being in conformity with due process of law.

This Court should unhesitatingly correct this error. It has long been held that an attorney is impliedly bound to act diligently and skillfully in the conduct of his client's case. *Wilcox v. Plummer,* 4 Pet. 172, 7 L. Ed. 821. Defendant's right to representation throughout all stages of trial and guaranty of due process, is violated where representation is of such low caliber as to amount to no representation. *Smallwood v. Warden Maryland Penitentiary,* 205 F. Supp. 325, U.S.D.C. Md. The denial of effective assistance of counsel to one charged with the same violates due

process. See *Hawk v. Olson*, 326 U.S. 271, 66 S. Ct. 116; and *Reece v. Georgia*, 350 U.S. 85, 76 S. Ct. 167.

Petitioner submits that it is apparent from the record here that his present plight resulting in respondent's personal judgment against him, resulted neither from acts of omission or commission on his part, but exclusively from mistake, inadvertence and carelessness and unauthorized appearance on his behalf by an attorney without actual right to appear for him.

In the case of *Bashin v. Montedonico*, 26 F. Supp. 894, affirmed 115 F.2d 837, it was held that general retainers do not authorize lawyers to accept service of process by which a Court acquires jurisdiction over a party. The relationship between an attorney and his client compels this. See *Water Hamner Arrester Corp. v. Tower, supra.* It has been held that a decree entered against persons not served with process, but for whom an unauthorized appearance has been entered by an attorney, will be reversed. See *Hatfield v. King*, 184 U.S. 162, 22 S. Ct. 477, 46 L. Ed. 481.

As early as 1847, the U.S. Supreme Court ruled, in the case of *Shelton v. Tiffin*, 6 Howard 183,

> "An appearance for a party not served, by counsel who has no authority to waive process and defend the suit, does not bind the party, and the judgment or decree is a nullity. Such want of authority may be proved by the attorney himself."

In this case the attorney testified that his appearance was an inadvertance on his part.

The Court stated further in arriving at its ruling:

> "This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the Court. Had the entry been, that L. P. Perry came personally into Court and waived process, it could not have been controverted. But

> the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

Virginia, as early as 1898, in the case of *McGeorge v. Big-Stone Gap Imp. Co.*, 88 Fed. Rep. 599, adopted this position and cited the case of *Shelton v. Tiffin, supra*, in its ruling. Again, in the case of *Nixon v. Rowland*, 192 Va. 37, the Court stated,

> "General appearance by attorney must be authorized before it will confer jurisdiction of the person on the Court."

Did, then, the Court apply the law, as above stated, in the case at bar? It is submitted that the trial Court did not.

As indicated previously, the trail Court ruled that no collateral attack could be made on a foreign judgment. It is respectfully submitted, however, that *Beck v. Semmes' Adm'r*, 145 Va. 429, holds otherwise. In this case, decided in 1926, the Court said,

> "Trial Court's decision cannot make illegal service or appearance legal so as to bar collateral attack on judgment."
>
> "Where it is sought to enforce in one state a judgment rendered in another state, the jurisdiction of the Court rendering the judgment may be assailed collaterally."

In *Snead v. Atkinson*, 121 Va. 182, the Court expressed its opinion with respect to judgments rendered by a Court having no jurisdiction of the party defendant. The Court there said:

> "The cases are decisive of the case at bar, for it must be indisputable that in order to enter valid orders a Court must have jurisdiction of the cause in which such orders can be entered in a case which has been finally disposed of, unless it has been first legally reinstated. . . . Mr. Freeman says as to a void judgment:
>
> > "If it be null, no action on the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, can invest it with any of the elements of power or vitality." *Freeman On Judgments*, Sec. 117; *Wade v. Hancock*, 76 Va. 626."

Again in the case of *Beck v. Semones' Adm'r, supra*, the Court there said, in determining the effect of a void judgment:

> "In order to render the judgments valid, it was necessary that Beck should have had authority to act at the time the judgments were rendered. No subsequent action of the board of directors could confer jurisdiction upon the court, if it did not exist when the judgments were rendered. If the defendant was not legally before the Court when the judgments were rendered, the judgments were void."

It would appear then, from the authorities cited, that if the evidence in the case at bar establishes that the petitioner did not waive service of process and was not properly before the Court, then the Court never had jurisdiction to render a judgment. The judgment rendered must be considered void and no action or inaction by the defendant could make it otherwise.

The testimony submitted by the petitioner on this issue remains uncontradicted, unimpeachable and conclusive. The two attorneys involved are reputable members of the bar, having practiced in the area for 30 years and 35 years respectively, (Tr. 64 and 66). All of their testimony must be believed because, and particularly in the case of Mr. Kiley's case, of strong admissions against interest.

The present case in controversy in the trial forum below, was the first and only occasion wherein petitioner has been afforded an opportunity to actually contest respondent's claims against him. Here, respondent was served with process and here respondent filed pleadings contesting the claims of respondent, and engaged counsel to actively and personally represent him. Here for the first time, all of the substantial and contending issues on the merits of respondents claims against petitioner, were raised and submitted to the trial court for its determination. Notwithstanding all of the foregoing, the trial court failed to act upon all of the evidence submitted by the contending parties, and the trial court utterly failed, neglected and refused to resolve these important issues.

When the respondent amended his petition to introduce a second cause of action, an opportunity presented itself to contest the respondent's claim against the petitioner for the first time. This time the petitioner retained counsel and filed pleadings raising substantial issues to be determined by the trial Court. The petitioner introduced evidence to support the position he had taken. He had every opportunity to be heard and, in fact, he was heard. He had his day in Court. However, having heard all the evidence on the merits, the trial Court made no determination. It elected to give validity to judgment rendered against the petitioner, who was not properly represented and was never afforded a fair trial, if, indeed, a trial at all.

No theory of our jurisprudence is more basic or fundamental than the constitutional prohibition against depriving one of his property without due process of law. If, in fact,

as the record of the Maryland proceedings discloses, the petitioner was before the Court, did his alleged counsel afford him adequate representation? As we have seen, Mr. Kiley made no effort, whatsoever, to protect the interests of the petitioner. All of the mistakes, omissions and general confusion relating to the Maryland judgment could have been remedied had the trial Court, here, having jurisdiction to do so, made its own ruling on the merits.

An integral part of "due process of law" is the right to a "day in Court", that is, an opportunity to be heard. *Moore v. Smith*, 177 Va. 621. A personal judgment must rest upon personal service of process, or upon voluntary appearance either in person or by some duly authorized agent, otherwise there is want of due process of law. *Lickard v. Whitenack*, 151 Va. 143.

CONCLUSION

For the foregoing reasons stated herein, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOSIAH LYMAN
501 - 13th Street, N.W.
Washington, D. C.
NA 8-6158

Attorney for Petitioner

APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

The petition of Malcolm B. Devers for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 6th day of August, 1969, in a certain action at law then therein depending, wherein District of Columbia National Bank was plaintiff and U.S. Metal Plastics, Inc., and the petitioner were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:
Howard G. Turner, Clerk

By: /s/ R. P. Tomlinson
Deputy Clerk

IN THE

CIRCUIT COURT OF ARLINGTON COUNTY

DISTRICT OF COLUMBIA
NATIONAL BANK

Plaintiff,

v.

U. S. METAL PLASTICS, INC. **At Law No. 12277**

and

MALCOLM B. DEVERS

Defendants.

ORDER

This day came the Plaintiff, District of Columbia National Bank, and the defendant, Malcolm B. Devers, by their attorneys, and neither party requiring a jury, but waiving a trial by jury and submitting the issues heretofore joined between the parties to the Court in lieu thereof, the Court, after hearing all the evidence adduced, is of the opinion that there is due the plaintiff, from the defendant, Malcolm B. Devers, on the claim set forth in Count 1 of the Amended Petition for Attachment filed herein, the sum of $22,940.17, together with interest from February 1, 1965, plus attorneys' fees in the amount of $3,856.25; and that, being entitled to recover upon Count 1, as aforesaid, said plaintiff is not entitled to recover on Count 2.

And it appearing that the attachment issued herein was levied on the following real estate of the defendant, Malcolm B. Devers, to wit:

> Lots 1 through 62, except Lot 34, and one-half of Lot 35 in Block 7; Lots 18 through 26 in Block 8, situated between North Nash and North Oak Streets,

and between 12th and 14th Streets North, Radnor Heights, Arlington, Virginia, comprising an area of approximately 230,000 square feet, with improvements thereon, known as Prospect House, 1200 North Nash, Arlington, Virginia;

and that the said property is still under the levy of the said attachment,

It is, therefore,

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff do recover of and from the defendant the sum of $22,940.17, with interest from February 1, 1965 thereon until paid, together with attorneys' fees in the amount of $3,856.25, and its costs about the prosecution of its suit in this behalf expended; and

2. That Joseph V. Gartlan, Jr. who is hereby appointed a Special Commissioner of this Court for the purpose, shall, after first ascertaining the amount, validity and priority of all liens, encumbrances and other interests upon or affecting the real estate, sell, subject to confirmation of the sale by this Court, the same at public auction, for cash, in front of the Court House of the Circuit Court of Arlington County, in Arlington, Virginia, subject to all liens, encumbrances and other interests which shall have priority over the lien of said attachment as determined by said Commissioner, and confirmed by this Court, all after advertisement of the time, place, date and terms of sale in a newspaper having a general circulation in Arlington County, Virginia, at least once a week for four (4) successive weeks prior to the date fixed for said sale, and make report of his action hereunder to this Court. The terms of sale shall require (a) that all persons desiring to bid at the public auction shall first deposit with the Special Commissioner, bid deposits in the amount of $5,000.00 in the form of cash or certified check as a condition of the right to bid, said bid deposits to be returned to the unsuccessful bidders at the conclusion of the sale; and (b) that the successful bidder, upon confirmation of

the sale by the Court and the fixing of such additional bond if any, as may be required, shall deposit 25% of the sales price (less the $5,000.00 bid deposit) with the Special Commissioner to be held by him pending full settlement on the sale. Before said Special Commissioner shall make such sale at public auction, he shall execute a bond with approved surety before the Clerk of this Court in the penal sum of $5,000.00, conditioned as the law directs; and

3. This cause is continued generally.

TO ALL OF WHICH THE DEFENDANT, MALCOLM B. DEVERS, NOTES HIS EXCEPTION.

Entered: August 6, 1969 /s/ Charles S. Russell
Circuit Judge

I ASK FOR THIS:

/s/ Joseph V. Garthan, Jr.
Attorney for Plaintiff

SEEN AND EXCEPTED TO:

/s/ John Dalonas
Attorney for Defendant
Malcolm B. Devers

PREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUN 22 1970
E. ROBERT SEAVER, CLERK

No. [redacted] 178

MALCOLM B. DEVERS,
Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
ARGUMENT	4
I. Petitioner Has Failed To Establish Reasons for Granting Review of The Virginia Judgment	4
II. The Court Below Did Not Err in Affirming the Lower Court Judgment	6
A. The Maryland Rules of Procedure Permit an Appearance to be Entered by a Plea	6
B. Petitioner Did Not Rebut the Presumption That a Valid Appearance Was Entered	7
C. A Collateral Attack on the Maryland Judgment Is Barred by Laches	9
D. Respondent Should Not Have Been Required To "Elect" Between Counts I and II. The Doctrine of Merger Is Inapplicable to This Case	11
E. The Evidence Presented to the Trial Court Clearly Supported Its Findings and Judgment	11
CONCLUSION	12

TABLE OF CITATIONS

Cases:

Barry v. Foyles, 1 Pet. 311 5

Page

Bethlehem Steel Corporation v. Devers,
389 F.2d 44 . . . . . 8, 9

Dorsey v. Kyle,
30 Md. 512, 96 Am. Dec. 617 10

Fisher v. March,
67 Va. 765, 26 Grat. 765 7

Howell v. Bethlehem – Sparrow's Point Shipyard,
190 Md. 704, 59 A.2d 680 6

Huntington v. Attrill,
146 U.S. 657, 13 S. Ct. 224,
36 L.Ed. 1123 5

Insurance Company v. Harris,
97 U.S. 331, 24 L.Ed. 959 5

Maloy v. McLean,
140 Md. 306, 117 A. 747 9

Nixon v. Rowland,
192 Va. 47, 63 S.E. 2d 757 7

Pollard v. Wright,
4 Cranch 421 5

Toland v. Sprague,
12 Pet. 300, 9 L.Ed. 1093 . . . . . 4, 5

Waltzinger v. Birsner,
212 Md. 107, 128 A.2d 617 6

Statutes:

Maryland Rules of Procedure 6

United States Constitution 5

Treatises:

American Jurisprudence, Second, Vol. 47,
Page 234 10

American Law Reports, Annotated
Vol. 88, page 12 10

Maryland Law Encyclopedia,
Vol. 13, page 302 9

IN THE

Supreme Court of the United States

No. 1603

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

The Respondent District of Columbia National Bank prays this court deny the Petition for a writ of certiorari to review the judgment entered by the Supreme Court of Appeals of Virginia on the 19th day of January, 1970.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case with the following exceptions.

On page 6 of his Brief, petitioner makes a statement that in its ruling on the case the Court "made no finding on Count II." From pages 6 and 7 of that portion of the transcript reporting the Trial Court's opinion, it is quite clear that the Court accepted the reasoning of counsel for petitioner (in which respondent entirely concurs) that if respondent was entitled to judgment on Count I "there will be no cause of action existing on the contract of guarantee." Furthermore in the Court's final Order the Court plainly held that "being entitled to recover upon Count I as aforesaid, said plaintiff is not entitled to recover on Count II."

Petitioner's Statement of the Case ignores entirely the largely uncontradicted testimony of one witness. At the trial in the Circuit Court for Arlington County, Virginia, Mr. David Cahoon, testified that he is an attorney admitted to practice in Maryland and that he was then the County Attorney for Montgomery County, Maryland; that he was in private practice in 1964 and that he represented the respondent bank in legal matters and in particular in respect to the action filed by the bank against U. S. Metal Plastics Corporation and petitioner (Tr. 14). He received a telephone call from Mr. Kiley on July 16, 1964, in which Kiley advised him that he was engaged to handle the matter and proposed that if Mr. Cahoon would give him an extension of time to file certain pleadings "he would enter an appearance of those defendants." (Tr. 16) Mr. Cahoon granted Mr. Kiley's request and testified that they both understood that the individual defendant had not been served. (Tr. 16) He denied (Tr. 22-23) that petitioner or anybody acting for him ever took the position, at least until the time his connection with the case was terminated, that Mr. Kiley's actions were unauthorized or

that the Circuit Court of Prince George's County, Maryland, lacked jurisdiction with respect to Mr. Devers. On cross examination (Tr. 25) he testified that Mr. Kiley indicated in the conversation aforesaid that he would enter an appearance by pleading for both parties if Mr. Cahoon would grant the requested extension of ten days to file responsive pleadings. He also stated (Tr. 28) that in conversations prior to the argument on the Motion for Summary Judgment in the Maryland Court he had discussions with Mr. Kiley, that Mr. Kiley made no suggestion indicating that he had not received notice that the Motion would be argued on the 28th and to the best of Mr. Cahoon's recollection he indicated that he was going to appear on that date.

Plaintiff's exhibits numbered 2, 3, 4 and 5, admitted without objection indicated the action taken by Mr. Kiley in the Maryland Court on behalf of both defendants.

Mr. Kiley testified (Tr. 88) that he had no specific recollection of the conversation testified to by Mr. Cahoon in which Mr. Kiley requested the extension of time for filing responsive pleadings. He admitted, in view of the date on which he did file the Opposition to the Motion for Summary Judgment and the accompanying Affidavit, that he would "very probably" have been required to obtain an extension of time and that "if the request was made, it would be made to Mr. Cahoon because he was attorney of record at that time." (Tr. 88)

On page 5 of petitioner's Brief the statement is made that the judgment against U. S. Metal Plastics Corporation and petitioner "was granted *Ex Parte*". This is hardly accurate. Mr. Cahoon testified (Tr. 18) that he received a copy of a notice from the Assignment Commissioner for the Circuit Court of Prince George's County (plaintiff's exhibit 6) that the Motion for Summary Judgment would be heard on Friday, August 28, 1964, that he had conversations with Mr. Kiley about the hearing date (Tr. 19,

20), and Mr. Kiley testified (Tr. 84) that he knew, in view of the filing date of his opposition, that the Motion would mature for hearing on the August Motions Day in that court but that he had "no recollection" (Tr. 83) of having received a notice from the Assignment Commissioner.

It should also be noted that, in addition to appearing at a deposition in aid of execution on the bank's judgment, Mr. Kiley took an active role in seeking to limit the scope of discovery proceedings incident thereto. See plaintiff's exhibits 4 and 5.

It should be noted that nowhere in the record before this Court or otherwise has petitioner set forth any substantive defenses he may have had to the bank's original claim against him on his guarantee.

ARGUMENT

I. PETITIONER HAS FAILED TO ESTABLISH REASONS FOR GRANTING REVIEW OF THE VIRGINIA OPINION.

Petitioner has failed to establish special and important reasons for granting review of the Virginia decision. Rule 19(1)(a) of the Rules of this court sets forth the general nature of cases in which this court will grant review on a writ of certiorari to a state court. Those cases in general must involve the decision of a federal question of substance not heretofore determined by this Court or in a way probably not in accord with applicable decisions of this court. Petitioner has failed on both counts.

As early as 1838, this court considered the question of whether a judgment was valid where no service of process was made. In that case, *Toland v. Sprague*, 12 Pet. 300, 9 L.Ed. 1093 (1838), it was determined that

there was no valid service of process on the appellant. The court continued:

> "The next inquiry is, whether the process of attachment having issued improperly, there has anything been done which has cured the error. And we think that there is enough apparent on the record to produce that effect. It appears that the party appeared and pleaded to the issue. . . . Now, this was a personal privilege or exemption which it was competent for the party to waive. The cases of *Pollard v. Wright* (4 Cranch, 421) and *Barry v. Foyles* (1 Peters, 311) are decisive to show that after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that an exemption from liability to process, and that in the case of foreign attachment too, is a personal privilege, which may be waived, and that appearing and pleading will produce that waiver. 12 Pet. at 330.

It is clear that the basic legal question presented by this case is neither undetermined nor was it decided in a manner not in accord with applicable decisions of this court.

The remaining issues are essentially factual and, as such, have been fully determined by the courts below. The transcript of trial gives a clear and descriptive account of the transactions leading up to and following the Maryland judgment. The finder of fact rightfully found that the Maryland court had jurisdiction over petitioner and gave that judgment full faith and credit, as indeed it must. U. S. Constitution, Art. 4, §8. *Huntington v. Attrill,* 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). *Insurance Co. v. Harris,* 97 U.S. 331, 24 L.Ed. 959 (1877).

II. THE COURT BELOW DID NOT ERR IN AFFIRMING THE LOWER COURT JUDGMENT

A. The Maryland Rules of Procedure, in Rule 124(a), state that an appearance may be made by filing any pleading. The entry of petitioner's appearance was accomplished by the filing of the Opposition to the Motion for Summary Judgment and the Affidavit in support thereof (Plaintiff's Exhibits 2 and 3).

A general appearance in an action at law, in Maryland, amounts to a waiver by the defendant of his right to object thereafter to the jurisdction of the Court over his person. *Howell v. Bethelehem – Sparrow's Point Shipyard,* 190 Md. 704, 59 A.2d 680 (1948).

Under the law of both Maryland and Virginia it is quite clear that this action on Mr. Kiley's part is presumed to have been authorized by petitioner.

In *Waltzinger, et al. v. Birsner, et al.,* 212 Md. 107, 128 A.2d 617 (1957), the Court held, at page 624:

> "When the appearance of an attorney is entered on record it is considered as done by the authority of the party. A presumption in favor of the authority of the attorney to appear arises from the mere fact of the appearance. The presumption is rebuttable, but the proof necessary to over come it should be full and clear [citations omitted]. This point was not raised until the end of plaintiffs', appellees' case by a motion for a directed verdict filed then and at the close of the entire case. In their brief the appellants cite no authority for this contention. According to 7 C.J.S., Attorney and Client, § 74, p. 833, ordinarily an objection based on want of authority of an attorney should be made promptly or at the earliest

> opportunity and before a plea has been filed. 5 Am. Juris. 309, Section 82, states that the proper method of attacking an attorney's authority to make an appearance is by motion supported by an oath showing *prima facie*, at least, his want of authority."

And in *Nixon v. Rowland*, 192 Va. 47, 63 S.E.2d 757 (1951), the Virginia Supreme Court held that an appearance by a regular attorney is presumed to be authorized but such presumption is rebuttable. The Court's attention is also directed to *Fisher v. March*, 67 Va. 765, 26 Grat. 765 (1875), which held that the evidence was insufficient to overcome the *prima facie* indication furnished by the record itself of the attorney's authority to act on behalf of his client.

B. The foregoing authorities, and the authorities and treatises cited therein, also make it clear that the burden of proof on the party seeking to overcome the impact of the presumption requires clear, satisfactory and convincing evidence.

Petitioner's case clearly fails to meet this test. Respondent's evidence was clear, concise, supported in every detail by the documentary evidence received by the court and inherently plausible and consistent. On the other hand Mr. Kiley's recollection totally failed him about matters which were crucial to the consistency of petitioner's version of the facts. It is utterly implausible that the numerous indications in the pleadings, subse- to judgment, would not have drawn his attention to the fact that plaintiff considered that it had recovered a judgment against both defendants. Several opportunities passed without his noticing this fact or taking any steps to correct the situation. It is even more implausible that petitioner himself would not have authorized counsel to mount an attack on the Maryland judgment when the bank commenced the proceedings against his property in

Page County, Virginia. He made no indication, verbal or written, through counsel or individually, of his contention that the Maryland judgment was void until the answer was filed in the Arlington County suit. It simply surpasses every requisite of credibility that any court should be asked to believe this story. The story is plainly hindsight and afterthought.

There is a rather completely applicable judicial precedent for the rule which should apply in this case as to the adequacy of the evidence necessary to overcome the presumption of authorization that attaches to an attorney's action in a judicial proceeding. In the case of *Bethlehem Steel Corporation v. Devers*, 389 F.2d 44 (4th Cir., 1968), the Court was presented with a strikingly parallel situation. In that case there were two defendants, a corporation and one of its officers. The defendant corporation had ordered certain materials from the plaintiff manufacturer and the officer had personally guaranteed payment of the purchase contract. Payment was not made, and suit was filed by the manufacturer against the corporation and the corporate officer as an individual. Service of process was accomplished against the corporation by service upon one of its officers and an attorney entered a general appearance for the corporate and the individual defendants, filed an answer to the Complaint, prepared responses to interrogatories, answered an Amended Complaint and contested two Motions for Summary Judgment. Ultimately the District Court found that the individual, who had not been personally served, had either given binding authorization to the attorney or had ratified his general appearance by failing to disavow his representation over a period of eighteen months. The United States Court of Appeals for the Fourth Circuit held that the Trial Court's findings, on the basis of which it had entered judgment against the individual and the corporation, were amply supported by the evidence and affirmed the judgment. Addressing

itself to the presumption of authorization upon which the plaintiff relied the Court said:

> "The presumption that an attorney who enters a general appearance has his client's authorization is a strong one. [Citing authorities] To overcome the presumption, the evidence must be clear and convicing, especially where the attack on the presumption is designed to invalidate a judgment." (389 F.2d at 45, 46).

This Court should know that in that case the individual defendant is the same Malcolm B. Devers who is petitioner here. The attorneys involved were the same Wallace Schubert and J. Ambrose Kiley who testified as witnesses in this case and the corporate defendant was the same U. S. Metal Plastics, Inc., named as a defendant in the Court below. In the Bethlehem Steel Corporation case, according to the opinion of the Fourth Circuit, Kiley claimed there, as he did here, that he appeared on behalf of Devers "through 'a marked degree of carelessness' and inadvertence." In that case as in this one Devers did not, in his efforts to attack the judgment of the Court against him, offer any substantive defenses to the plaintiff's claim.

The two cases taken together clearly establish a pattern of activity by these parties and their counsel. It is significant that neither Mr. Kiley nor Mr. Devers could recollect, when questioned on the matter at the trial in this case, whether such an incident had ever happened before.

C. A collateral attack on a judgment is an attempt to impeach the judgment in an action other than that in which it was rendered, as distinguished from a direct attack which is a proceeding instituted for the very purpose of avoiding or correcting a judgment in some particular, and brought in the same action and in the same Court. M.L.E., *Judgments* § 133. This is the law of Maryland. *Maloy v. McLean*, 140 Md. 306, 117 A. 747 (1922).

In that state laches, or the failure to act when action is required, will preclude a collateral attack on a judgment by a defendant contending that this appearance in the case by an attorney was unauthorized. The party seeking to be relieved from a judgment on this ground should move in the matter without delay and as soon as practicable after knowledge of the existence of the judgment is brought home to him; and acquiescence or unnecessary delay is fatal to his right to relief. *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617 (1869).

Where a judgment in the state which rendered it is immune from collateral attack, it is not subject to such an attack in another state. 47 Am. Jur. 2d, 234, Judgments § 1230.

In other words, petitioner would be doomed to failure in an attack upon the judgment on which this suit was brought had that attack been made in Maryland, and in fact did so fail when a motion to vacate this judgment was heard and denied on April 30, 1970, in the Circuit Court for Prince George's County, Maryland.

While counsel for respondent is not aware of authority precisely on the point in Virginia, there is ample authority for the proposition that the right to maintain a collateral attack upon a judgment may be lost by laches, acquiescence, ratification or estoppel. In this connection the Court's attention is respectfully directed to the cases collected, beginning at page 62, in the annotation at 88 *A.L.R.* 12. There is, therefore, ample authority for the theory behind the ruling of the Court below.

It follows that petitioner cannot be heard to complain of a lack of due process in circumstances where for almost three years, with full knowledge that the judgment was being enforced against him, he failed to seek due process in the Maryland Courts where it was clearly available to him.

D. Counsel for respondent cannot understand petitioner's argument with respect to point I in his Brief which is made without citation of any authority to support it. Petitioner appears to be contending that respondent's alternative pleadings were bad and that the court should have required respondent to elect at the start of the trial as to the cause of action on which it would proceed.

Respondent has no quarrel with the authorities cited for the proposition that a cause of action is merged in a valid judgment rendered upon it and that in this case respondent's claim against petitioner on his contract of guarantee had been merged in the Maryland judgment. But in this very proceeding petitioner was clearly attacking the validity of the Maryland judgment and it was this attack which prompted petitioner's alternate pleading, in effect asking for judgment on the original cause of action if the Court should be constrained to hold that the Maryland judgment was for some reason invalid. The inevitable effect of a declaration by the trial court that the Maryland judgment was invalid would have been to nullify any "merger" of the original cause of action in the judgment and it would have retained its status as a viable basis for a claim against the defendant.

The Trial Court clearly proceeded in a correct manner, permitted respondent to prove its case on its first cause of action, the Maryland judgment, and denied respondent relief on its second cause once the validity of the Maryland judgment and its binding effect upon petitioner had been determined.

E. The evidence in the Court below clearly supports the findings and judgment of the Trial Court. It is respectfully submitted that this evidence would have justified a finding that Mr. Kiley's actions on behalf of petitioner were authorized and that petitioner was bound by the judgment for that reason. The evidence more strongly

supports the Court's conclusion that whether or not Mr. Kiley was authorized to do what he did, petitioner clearly slept on his rights after he had ample notice of the claim against him, and, by reason thereof, was barred from challenging the Maryland judgment on the ground he did.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Court's Order of August 6, 1969, was clearly correct and that the petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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Washington, D.C. 20006
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 178

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 178

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's Order dated October 12, 1970, denying the petition for writ of certiorari to the Supreme Court of Appeals of Virginia and respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner submits that the trial court below prejudiced his rights in arbitrarily refusing to require respondent to make an election of the cause of action under which it would proceed. Such an election is founded in the law applicable to this cause in Virginia. The failure of the trial Court to protect petitioner's basic rights in this respect, resulted in a deprivation of his property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

Petitioner further submits that the trial Court below arbitrarily refused to consider valid and substantial evidence presented, that the foreign judgment (Maryland) obtained by respondent against petitioner and sued upon in the Court below (Virginia) was in substance and in fact a void judgment. The trial Court below erroneously and arbitrarily honored the foreign judgment of Maryland in its Court, without subjecting it to the scrutiny of its validity, when the same was validly challenged by petitioner; that such an arbitrary decision by the Court below and the narrow view it accorded to the presumption of the validity of the foreign judgment of Maryland, was of such dimension as to violate petitioner's fundamental rights of due process under the 14th Amendment of the Constitution of the United States. A reasonably careful review of the record in this case can not help but reveal that the foreign judgment of Maryland, sued upon by petitioner in the Court below (Virginia) was void, since originally the Court (Maryland) entering the judgment did not have jurisdiction over the person of the petitioner herein. The record clearly reveals that petitioner was never served with process in Maryland; and the record clearly and abundantly reveals that counsel who entered his appearance for petitioner in Maryland, did so inadvertently and through mistake; and the record further reveals that petitioner never sanctioned nor authorized Maryland counsel to appear for him in that cause.

The utter and literal refusal of the trial Court below to properly equate petitioner's irrefutable evidence, that he was never served with process in Maryland and hence not before that Court, with the law applicable to such circumstances, was clearly error. The failure and refusal of the trial Court below to find the judgment (Maryland) was void, in light of the record, makes manifest a clear violation of petitioner's basic constitutional rights.

Since it is apparent from the record herein, that petitioner never had an opportunity to contest the validity of respondent's claim against him in any trial, in a case in controversy, the trial court below should have granted him that opportunity and right. Failing to afford petitioner its forum as a trial for all issues in his case, violated his fundamental rights and constituted deprivation of his property without due process of law.

POINT I

The respondent herein initiated proceedings in the Circuit Court of Arlington County, Virginia, and chose to amend its pleadings asserting claims for relief against petitioner in Two Counts. Petitioner submits that he responded to both claims asserted against him. In his posture of the trial petitioner properly sought to require respondent to make an election of the cause of action under which it was asserting its claims, but the trial Court refused to require respondent to make such an election.

Since respondent sued on the judgment (Maryland), and the original cause of action was one in contract, the same had been merged in the judgment. This view comports with Virginia law as set forth in the case of *Sands v. Roccer*, 118 Va. 191, decided in 1915. The ruling of the trial Court that the two counts were not inconsistent, but were merely pleadings in the alternative was error. Petitioner was entitled to have the court require respondent to elect which count upon which it was going to proceed. Failure to do so clearly prejudiced petitioner's rights.

POINT II

Respondent instituted proceedings against petitioner in the Court below upon a foreign judgment (Maryland) which petitioner always contended was in fact and in substance a void judgment. The record is replete with evidence supporting petitioner's contentions as to the invalidity of the foreign judgment (Maryland) obtained originally against him by respondent. The trial court below (Virginia) arbitrarily refused to scrutinize the valid and legitimate contentions and position of petitioner, all of which were supported by adequate and substantial evidence. Petitioner urged again and again that the foreign judgment (Maryland) was void, since that Court never had jurisdiction over him so as to be able to legally and validly enter a lawful judgment against him in favor of respondent.

The record clearly shows that petitioner was a non-resident of Maryland at the time of the entry of the judgment against him in favor of respondent. The case of *Owens v. McCloskey (Owens v. Henry)*, 161 U.S. 64, 16 S.Ct. 683, 40 L.Ed. 837, held that a judgment rendered in an action of debt against a non-resident, who has not been served with process or failed to voluntarily appear as a defendant in such case, has no binding force. Such was the situation in the case at bar so far as the foreign judgment (Maryland) was concerned herein. In the case of *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761, it was held that no person is required to answer a suit on whom process has not been served. Such was the position of petitioner in the case at bar. This fundamental and basic principle of law as asserted in the above precedent is immutable. The record clearly supports petitioner's position, that the Maryland Court never had jurisdiction over his person.

In light of the record of this case and the law applicable thereto, the determination of the issues in this case by the Court below can hardly be detached from arbitrary action on its part, the same being contrary to established law.

POINT III

Petitioner submits that the record of this case is replete with evidence pointing to nullity and invalidity of the foreign judgment (Maryland) obtained against him upon which respondent instituted its suit in Virginia in the case at bar. Petitioner neither waived service of process upon himself, nor did he voluntarily enter an appearance, or ever appear before the Maryland court. Further, petitioner did not authorize or sanction an attorney to enter an appearance for him in the Maryland case.

The record is clear and replete with evidence that only through mistake and inadvertence, and for no other reason or cause, did an attorney enter his appearance for an on behalf of petitioner herein. Unless petitioner sanctioned such representation of his person by counsel, it must follow that the judgment subsequently entered against him individually is void. Since the Maryland Court did not have jurisdiction over him, respondent, in Virginia, instituted proceedings against petitioner upon an invalid and void judgment.

In the case of *Levy v. Fitzpatrick*, 15 Pet. 167, 10 L.Ed. 699 it was held that a valid and subsisting judgment could not be entered against a defendant unless properly served with process or unless he waives the necessity of such service of process. Also see *Godfrey v. Terry*, 96 U.S. 171, 24 L. Ed. 944, also see *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648.

In the case of *Water Hammer Arrester Corp. v. Tower*, 66 F. Supp. 732, affirmed 156 F.2d 775, cert. denied 67 S.Ct. 501, 329, U.S. 806, rehearing denied 67 S.Ct. 674, cert. denied 68 S.Ct. 452, the court held that the relationship between an attorney and his client is too sacred to admit even the shadow of abuse, and every doubt will be resolved in favor of the client. Also see *National Exchange Bank v. Wiley*, 195 U.S. 257, 25 S.Ct. 70, 49 L. Ed. 184.

The Courts of Maryland have long held that they have no jurisidction to render a judgment against one not served

within the state, nor voluntarily appearing before the Court. See *Piedmont-Mt. Airy Guano Company of Baltimore v. Merritt*, 140 A. 62; 154 Md. 226, and also see *Wilmer v. Epstein*, 81 A. 379, 166 Md. 140.

In Virginia as early as 1898 in the case of *McGeorge v. Bigstone Gap Imp. Co.*, 88 Fed. Rep. 599, it was held that a general appearance by an attorney must be authorized before it will confer jurisdiction of the person on the Court. Also see the case of *Nixon v. Rowland*, 192 Va. 37, and *Shelton v. Tiffin*, 6 Howard 183. The failure of the trial Court below in the case at bar to protect his rights and void its arbitrary rulings and findings in favor of respondent constituted a violation of due process unto petitioner and precluded him from equal protection of the law as assured and guaranteed under the 5th and 14th Amendments to the Constitution of the United States.

POINT IV

Petitioner herein had only one opportunity to seek a resolution of his position with respect to the validity of the foreign judgment (Maryland) and that obtained in the case at bar. Yet, notwithstanding this, the trial court below refused to grant him this opportunity and grant him "his day in court".

All of the issues, pertaining to and concerning the validity of the foreign judgment (Maryland) and all other issues existing between these parties were available to be resolved in this case in controversy in the trial forum below. Notwithstanding all of the foregoing, the trial court failed to act upon all of the evidence submitted by petitioner; and the trial court utterly failed, neglected and refused to resolve all issues presented. This failure and denial on the part of the trial court was a denial of due process unto petitioner and violated his basic Constitutional rights.

An integral part of "due process of law" is the right to a "day in court" that is, an opportunity to be heard. *Moore*

v. Smith, 177 Va. 621. A personal judgment must rest upon personal service of process, or upon voluntary appearance, otherwise there is want of due process of law. Also see *Lickard v. Whitenack*, 151 Va. 143. The arbitrary denial by the trial court below of petitioner's right to be heard on all issues in this case and to have the trial court consider all of the same, impartially, makes manifest that this petitioner was denied due process as guaranteed by the Constitution of the United States.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a Writ of Certiorari issue to the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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NA8-6158

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CERTIFICATE OF COUNSEL

I, Josiah Lyman, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58 Subdivisions 1. and 2. of the Rules of this Court.

Josiah Lyman
Attorney for Petitioner